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No. 345

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, SUED IN THE NAME OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, PETITIONER

v.

P. LEROY HARWOOD, AS TRUSTEE IN BANKRUPTCY OF GROTON IRON WORKS, AND ISAAC SIEGEL AND JOHN M. P. THATCHER, AS ANCILLARY RECEIVERS OF UNITED STATES STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE FLEET CORPORATION

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v.

P. LEROY HARWOOD, AS TRUSTEE IN BANKRUPTCY OF Groton Iron Works, and Isaac Siegel and John M. P. Thatcher as Ancillary Receivers of United States Steamship Company

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE FLEET CORPORATION

The supplemental brief for the respondents Siegel and Thatcher has just been served on us. This memorandum is in reply to that brief and also to certain arguments in the principal brief filed on behalf of the respondents.

REPLY TO SUPPLEMENTAL BRIEF OF RESPONDENTS SIEGEL AND THATCHER

In the brief for the Fleet Corporation it was argued (p. 18) that the Contract of March 26, 1920, was made by the Fleet Corporation as the agent of the United States, because that contract awarded "just compensation," which the Fleet Corporation had power to do only as the agent of the United States, under authority delegated by the President pursuant to the Act of June 15, 1917. In opposition to this argument, the respondents Siegel and Thatcher in their supplemental brief state (p. 6):

> The Fleet Corporation could not have been discharging the obligation of the United States, since that obligation was to make just compensation to be determined by the President, and the Fleet Corporation was never authorized to make this determination or to discharge this obligation.

This statement is contrary to the actual facts. The Act of June 15, 1917 (pp. 42–44 of our brief) expressly provided that—

> The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: * * *.

Pursuant to this authority, the President by his Executive Orders of July 11, 1917 (pp. 44–45 of our brief), and of December 8, 1918 (pp. 45–47 of our brief), the President delegated his power in this

respect to the Fleet Corporation. By the latter Order it was provided:

> The United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority now vested in me by said laws with reference to any and all activities which may be directly or indirectly applicable to ship or plant construction; * * *.

Under this authority delegated to it by the President, the Fleet Corporation did in fact hear claims and determine "just compensation" until the passage of the Merchant Marine Act, 1920, on June 5, 1920. See *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 118; Annual Report of the Shipping Board, 1920, p. 173. By Section 2 (c) of the Merchant Marine Act (p. 51 of our brief) it was provided that "the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation." Thereafter, in pursuance to the provisions of the statute, awards of "just compansation" have been made by the Shipping Board.

REPLY TO BRIEF FOR RESPONDENTS

I

The respondents argue in their brief (pp. 33 *et seq.*) that it would be a great injustice to them if it should be held that the United States rather than the Fleet Corporation was the proper party de-

fendant in this action. If any doubt was entertained by counsel for respondents as to the proper party defendant, that doubt should have been dissipated by the *Russell-Freygang-Anderson cases*, 261 U. S. 514, decided by this Court in April, 1923, less than one year after the *Sloan-Astoria* decision. Freygang sued the United States *in the Court of Claims* on a contract executed by the Fleet Corporation on July 16, 1918, which called for the construction by plaintiffs of certain wood hulls and barges, and was in form similar to the earlier contracts involved in the instant case. Just prior to the Armistice the Fleet Corporation, acting under its delegated authority, canceled some of the work but permitted plaintiffs to complete some of the barges. A supplemental contract between plaintiffs and the Fleet Corporation dated April 14, 1920, attempted to settle the difference which had arisen between the shipbuilders and the Government because of the cancellation. The Court of Claims allowed a judgment *against the United States* on this settlement contract executed by the Fleet Corporation (57 Ct. Cls. 244), and this Court affirmed the judgment (261 U. S. 514). *Gilbert* v. *United States*, 60 C. Cls. 1005, certiorari denied, 271 U. S. 660, is similar.

The facts and circumstances surrounding the case at bar are analogous to those in the *Freygang case*. Respondents' complaint that they have lost their right to sue the United States in the Court of Claims because of misinterpretation of the effect of

the *Sloan-Astoria* decision does not seem convincing in view of the *Freygang case*, which held that the remedy of claimants for obtaining redress on war contracts and transactions of the Fleet Corporation was by suit against the United States in the Court of Claims.

II

Even though the respondents are now precluded from seeking relief in the Court of Claims, the record does not disclose that Groton has lost substantial rights, and in view of the fact that respondents seek to make it appear that an affirmance of the decree of the District Court will produce an unjust result, it seems fair to refer here to other proceedings which are referred to but not explained in full in the record.

In transactions connected with the contracts here involved, Groton executed mortgages to the Fleet Corporation (R. 219, 220) to secure advances and payments. On March 1, 1920, the principal amount secured by these mortgages totalled $1,716,666.67. (R. 77.) The accumulated interest up to the present time approximates $1,000,000. In 1923 these mortgages were assigned to the United States. (R. 222.) The United States brought an action to foreclose these mortgages. (R. 97.) While it does not appear in the record, it is a fact that the mortgaged property was sold, and the proceeds of the sale amounted to less than $95,596.67. This sum is

now being held by the District Court of Connecticut to await the outcome of this suit.

Consequently if the Fleet Corporation be required to enter into an accounting with Groton in accordance with the decree of the Court below, it seems probable that it will be precluded from setting off the mortgage debt, because it has been duly assigned to the United States by a written assignment (R. 222) as well as being transferred by law. (Sec. 4, Merchant Marine Act, 1920; see p. 51 of Brief for Fleet Corporation.)

Thus, if the decree of the Circuit Court of Appeals is affirmed, there may be a decree for the respondents on the accounting, because the Fleet Corporation could not offset the mortgage debt, and the money paid in compliance with this decree will be general assets of the bankrupt estate. The United States will hold an uncollectible deficiency judgment against Groton on the mortgage debt. We submit that Congress could not have contemplated a result so incongruous and so unjust to the Government.

III

In the brief for the Fleet Corporation we contend (pp. 34–38) that, whoever may have been bound originally by the contracts in question, this liability has been assumed by the United States, and that Congress by Sections 2 (b) and 2 (c) of the Merchant Marine Act, 1920 (set out on pp. 50–51 of the brief for the Fleet Corporation), provided

an exclusive remedy for the enforcement of the liability. But the respondents contend (p. 45 of their brief) that "if such be the interpretation to be placed upon the proviso of subdivision (c), its effect is completely to destroy the preservation of the remedies attempted to be preserved by paragraph (2)."

The two subsections must be construed together. Although their provisions are not wholly explicit, we submit that the Congressional intention may be readily ascertained by reference to other sections of the Act. The reason for the declaration in Section 2 (b) (2) that "all rights, interests, or remedies" and "any action taken" "shall be in all respects as valid, * * * subject to the provisions of subdivision (c) of this section, as if this Act had not been passed" is plain. Section 2 (a) of this Act repealed the prior Acts, including the Emergency Shipping Fund provisions of the Act of June 15, 1917. The provisions of Section 2 (b) (2) just quoted were consequently inserted, because the repeal of the former Acts was not intended to affect the validity of the contracts executed, the actions taken and the interests acquired under them.

The situation is similar as to "remedies." The remedies which Congress intended to preserve were those accruing to the United States under the former contracts, agreements, and actions taken, including the right of the United States to sue for breach of such contracts, to enforce penalties and collect liquidated damages, and to recover moneys

unlawfully paid under such contracts. The remedies preserved to claimants were the right to sue the United States on the contracts, and the right to claim and sue for just compensation for modification, suspension, and cancellation of such contracts.

Congress took away from the Fleet Corporation all authority over the contracts, directed the Shipping Board to assume them and carry them out and stripped the Fleet Corporation of all assets acquired under the contracts. (Sec. 4, Merchant Marine Act, 1920; pp. 51–52 of our brief.) Suppose that a contract had been executed by the Fleet Corporation *before* June 5, 1920, and the breach complained of occurred *after* the Shipping Board started to carry out the contract. Would the Fleet Corporation be liable? Could it be held for damages occasioned by the breach of the Shipping Board (*i. e.*, the Government), that being a breach over which the Fleet Corporation had no control? Yet, if respondent's theory is correct, it is the corporation's promise that has been broken and a remedy against that agent that has been preserved.

From what source could the Fleet Corporation obtain the money to pay any judgment that might be rendered in this case? Not from its capital-stock fund. That money was all spent prior to the end of 1917. (R. 242, 244.) Not from any assets received while acting as the President's agent. Such assets were transferred to the Shipping Board. Is it possible that Congress intended by

Sections 2 (b) (2) and (c) to preserve a naked right to obtain a judgment against an agent who possesses no means for satisfying such a judgment? As we have pointed out in our brief (pp. 36-37), it seems clear that Congress had no such futile purpose. Congress not only provided a remedy against the United States but by the General Appropriation Act of June 12, 1922 (the pertinent provision is set out at p. 37 of our brief) it made provision for satisfying these claims *against the United States.*

That Congress intended by the Merchant Marine Act to take away the activities under the war legislation from numerous agencies, including the Fleet Corporation, and to substitute for these agencies the Shipping Board is clearly indicated by the Report of the Committee on Merchant Marine and Fisheries to the House, accompanying H. R. 10378, which later became the Merchant Marine Act, 1920. This Report (House Rep. 443, 66th Congress, 1st Session, p. 1) stated in part:

> The committee found that in order to establish regularity in the future conduct of the numerous different shipping activities, operated either by order of the President through emergency legislation or by the original shipping act, it would be necessary to concentrate all of these operations under one authority, repealing such legislation rendered unnecessary by the ending of the war and providing new legislation for the operation and handling of the property acquired. With this in

> view the bill (H. R. 10378) has for effect, first, the repealing of the various bills containing legislation in connection with the upbuilding of the merchant marine, together with the bills containing the unusual powers granted to the President and which were essential for successful operation during the war; and it transfers all the powers necessary for its liquidation, construction, or operation to the Shipping Board, fixing the scope of the Shipping Board's powers so that they can absorb all of these activities. These provisions are contained in sections 1 and 2 of the bill.

IV

Several minor matters deserve brief mention.

The respondents state in their brief (p. 7) that "Each of the contracts involved in this case is identical in form and substance with those" construed in the *Sloan-Astoria Cases*, 258 U. S. 549. As we have pointed out (p. 14 of our brief) the form of the contract of March 26, 1920 (R. 75) was materially different from any involved in the *Sloan-Astoria Cases*. In this connection it may be pointed out that the Record shows (R. 226 *et seq.*) that Groton knew it was dealing with the Government.

The respondents state in their brief (p. 30):

> In *Providence Corporation* v. *Downey Shipbuilding Corporation*, 294 Fed. 641 (certiorari denied 264 U. S. 586), and in *Smith* v. *Fleet Corporation*, 26 Fed. (2d)

> 337 (certiorari denied 278 U. S. 628) the same Circuit Court of Appeals [2d] again held that the substantive rights and liabilities of the Fleet Corporation under contracts executed in its own name, although acting for the United States, were those of a principal.

Reliance is then placed on the fact that this Court denied certiorari in these cases. But an examination of these cases shows that neither supports respondents' contention. *Smith* v. *Fleet Corporation* arose out of the activities of the Fleet Corporation in operating ships and has no bearing on the effect of contracts for the construction of ships; and, although the language in *Providence Engineering Corporation* v. *Downey Shipbuilding Corporation* is broad, the actual decision did not impose any liability on the Fleet Corporation.

We submit that respondents are in error in their attempt (p. 32 of their brief) to distinguish *United States* v. *Skinner & Eddy Co.*, 35 F. (2d) 889 (C. C. A. 9th) from the earlier decision in the same Circuit in *United States* v. *Matthews*, 282 Fed. 266. It is true that "the *Skinner & Eddy case* was between the United States and the contractor, not between the Fleet Corporation and the contractor, and the claim asserted by the contractor being for just compensation on account of the cancellation of his contract, was exclusively cognizable by the Court of Claims." The same is true of *United States* v. *Matthews*. Both cases were suits by the United States and not by the Fleet Corporation.

The respondents suggest (p. 47 of their brief) that there may be doubt as to the constitutionality of the Merchant Marine Act if it is interpreted to provide an exclusive remedy against the United States in place of a former remedy against the Fleet Corporation. But the prohibition against laws impairing the obligations of contracts does not apply to the United States. *Sinking Fund Cases*, 99 U. S. 700, 718. And it can not be a denial of due process of law to substitute the liability of the United States for that of one of its creatures, wholly owned by the United States.

Respectfully submitted.

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